

Appeal from a decision of the Director, Minerals Management Service, assessing late payment charges for underpayment of royalties due on coal lease No. C-22644.

Affirmed.

1. Coal Leases and Permits: Royalties--Payments: Generally

30 CFR 218.200 (1985) authorizes the Minerals Management Service to impose a late payment interest charge where royalty payments for coal leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the Government for loss of use of funds due but not paid.

2. Board of Land Appeals--Estoppel

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

3. Board of Land Appeals--Estoppel

The Board of Land Appeals has expressly ruled that, as a precondition for invoking the defense of estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision.

APPEARANCES: Michael S. McCarthy, Esq., Brian D. Wylie, Esq., Denver, Colorado, for appellants; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard W. Chalker, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Cyprus Western Coal Company (Cyprus), successor in interest by merger with Colorado Yampa Coal Company (Colorado Yampa) and Getty Minerals Marketing, Inc., appeals from a decision of the Director, Minerals Management Service (MMS), dated June 19, 1986, denying Cyprus' appeal of an MMS assessment of late payment charges for underpayment of royalties due on coal lease No. C-22644. The charges were assessed under the authority of 30 CFR 218.200 (1985), now 30 CFR 218.202.

This lease was originally issued effective July 1, 1979, for 1,789.70 acres to Colorado Yampa with an 18.3-percent royalty rate. The royalty rate was reduced to 12.5 percent for a 1-year period beginning October 1, 1980, which was later extended through September 30, 1983.

On July 1, 1981, the lease was modified to include an additional 156.75 acres at a royalty rate of 12.5 percent. The modified lease provided that the royalty rate for the original 1,789.70 acres remained 18.3 percent.

In a letter to Colorado Yampa dated September 11, 1984, the Bureau of Land Management (BLM) stated that upon expiration of the reduction in royalty provision on September 30, 1983, the royalty rate for the original 1,789.70 acres reverted from 12.5 percent to 18.3 percent. Therefore, BLM noted, as of October 1, 1983, the royalty rates for coal lease C-22644 are 18.3 percent for the original 1,789.70 acres and 12.5 percent for the 156.75 acres added through modification. BLM pointed out that since October 1, 1983, all royalty payments for the lease were made at the 12.5-percent rate. Therefore, BLM explained, there are delinquent royalty payments due for any production from the original acres since October 1, 1983. BLM concluded by notifying Colorado Yampa that upon receipt of its production tonnage and maps, MMS would determine the delinquent amount and daily interest on the delinquent amount and bill Colorado Yampa accordingly.

In October 1984, Cyprus filed a royalty reduction application seeking a retroactive reduction of the royalty rate applicable to the lease effective October 1, 1983. BLM informed Cyprus that until its current payment obligations were met the lease would be considered as not in good standing and no action would be taken to process the Cyprus royalty reduction application.

On December 20, 1984, representatives of Colorado Yampa, Cyprus, MMS, and BLM met to discuss underpayment of royalties. The parties agreed that Cyprus would pay \$2,157,485.24 which would represent the total amount that the Department of the Interior claims to be due and owing as royalties with respect to the lease.

On February 7, 1985, MMS notified Colorado Yampa that it had received its delinquent royalty payment of \$2,157,458.24. MMS stated that since the payments were not submitted in full during the month in which they were due, it was assessing a late payment charge (interest) as required by 30 CFR 218.200 (1985).

By letter of November 6, 1985, MMS notified Colorado Yampa that it had subsequently reviewed the information submitted by Colorado Yampa and determined that additional royalties of \$118,718 were due. Again, MMS added that appropriate late charges would be computed and billed to Colorado Yampa. By letter of January 3, 1986, MMS notified Colorado Yampa that it was required to pay \$28,669.41 in interest charges on late payments in order to bring the lease into compliance with 30 CFR 218.200 (1985). In February 1986, MMS reduced the interest charges to \$28,577.36 based on receipt of additional information.

In its appeal to the Director, MMS, Cyprus asserted that its payments in December 1984 and November 1985 of the disputed principal amounts of royalty due were made as a result of negotiations with the Department and it was led to believe that these payments satisfied all outstanding royalty obligations with respect to the lease. Cyprus submitted that an exercise of discretion by MMS pursuant to 30 CFR 218.200 (1985) would be appropriate in this situation and that assessment for late charges should not be made.

In his decision denying the appeal, the Director explained that it is the policy of the Government to assess late payment charges on all debts not received by the due date. The Director stated that 30 CFR 218.200 (1985) provides MMS with authority to make such assessment for the failure to make timely payment of any monies due from activities covered by the regulations. Having reviewed the record, the Director found that MMS had notified Cyprus several times that a late payment charge would be assessed. Therefore, the Director found that Cyprus' contention that it believed all outstanding royalty obligations with respect to this lease had been satisfied, is not supported by the record.

On appeal, Cyprus asserts that it made timely payment of lease royalties and therefore late payment charges were improperly assessed under 30 CFR 218.200 (1985). Cyprus explains that more than 10 months after it paid over \$2 million in contested royalties to MMS, it received an invoice dated November 6, 1985, for \$118,718 additional royalty payments which MMS had omitted from its calculations as of December 20, 1984. Cyprus points out that it made timely and proper payment of this amount by check dated November 19, 1985, and therefore MMS' assessment of a late charge under 30 CFR 218.200 (1985) is without foundation. Cyprus further contends that it qualifies for exception to late payment charges provided by 30 CFR 218.200 (1985).

Cyprus contends that MMS should be estopped from claiming that late payment charges are due, and refers to the four elements which must be present to establish the defense of estoppel as described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970):

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96.

Cyprus contends that each of these elements has been met in the present case. Cyprus claims that in view of the subsequent assessment, MMS must be charged with knowledge that it intended to levy late payment charges as of the December 20, 1984, meeting; that the Departmental representatives at the meeting were advised that Cyprus would make the demanded royalty payment based on their statements; that Cyprus was ignorant of the fact that MMS intended not to waive the late payment charge; and that Cyprus made its payment with the expectation that it was satisfying all outstanding royalty obligations and would owe no further amounts.

Cyprus recognizes that in addition to the traditional elements of estoppel, estoppel against the Government must be based upon affirmative misconduct. Cyprus asserts that it was arbitrary and capricious of MMS to assert that Cyprus failed to make timely payments after it paid on December 26, 1984, the total amount of delinquent royalties which the Department advised Cyprus that it owed at that time. Thus, according to Cyprus, the Department engaged in affirmative misconduct by advising Cyprus of the precise amount to be paid, giving rise to an estoppel from subsequently seeking to collect a late payment charge on a further amount that was not included in the December 26, 1984, royalty payment because it had not yet been ascertained or billed by the Department.

In response, MMS contends that Cyprus' royalty payments were not timely. MMS points out that the time that royalty payments are due is specified in the lease. Section 6 of Cyprus' leases provides as follows: "Production royalties shall be payable the final day of the month succeeding the calendar month in which the coal is sold, unless otherwise specified in 30 CFR 211 [now 43 CFR 3480]." MMS asserts that Cyprus did not make full payment of its royalties at the time specified in the lease. Therefore, MMS concluded that the delinquent part of its royalty payments was late and late payment charges were properly assessed on that amount.

MMS contends that Cyprus does not qualify for the exception to late payment charges set forth in 30 CFR 218.200 (1985). MMS states that this exception refers to a situation where a lessee makes prior arrangements with MMS to make "estimated payments." MMS asserts that Cyprus made no such arrangements.

MMS contends that the four elements of estoppel are not present in this case. MMS claims that it did not know all the facts at the time of the December 1984 meeting. MMS asserts that it did not tell Cyprus that additional royalties and late payment charges would not be collected. MMS notes that Cyprus was not ignorant of the true facts because BLM informed Cyprus by letter dated September 11, 1984, that an audit would be conducted and late payment charges would be assessed. MMS contends that there is no evidence that Cyprus took any action or failed to act in reliance on any statement made by MMS.

MMS asserts that there was no affirmative misconduct, and that it cannot be estopped from requiring Cyprus to pay late payment charges in accordance with express regulatory requirements.

[1] The regulation dealing with late payment charges, 30 CFR 218.200 (1985), provides in pertinent part as follows:

(a) The failure to make timely or proper payment of any monies due pursuant to leases and contracts subject to these rules will result in the collection by MMS of the full amount past due plus a late payment charge. Exceptions to this late payment charge may be granted when estimated payments on minerals production have already been made timely and otherwise in accordance with instructions provided by MMS to the operator/lessee. However, late payment charges assessed with respect to any Indian lease, permit, or contract shall be collected and paid to the Indian or tribe to which the amount overdue is owed.

According to section 6 of Cyprus' lease, production royalties are payable the final day of the month succeeding the calendar month in which the coal is sold unless otherwise specified in the regulations. The royalty rate is set forth in the modified coal lease of July 21, 1981. Under 30 CFR 218.200 (1985), the failure to make timely or proper payment of monies due under the lease will result in a late payment charge. The language of this regulation is clear. Since Cyprus did not pay a portion of its royalties within the time specified in its lease, its payment was not "timely" within the meaning of 30 CFR 218.200 (1985) and MMS properly assessed a late charge. The Board has recognized that the imposition of late payment charges is appropriate to compensate for the loss of use of funds due but not paid. Peabody Coal Co., 72 IBLA 337, 348 (1983). ^{1/}

Cyprus' argument that it qualifies for the exception to late payment charge is without merit. Under 30 CFR 218.200 (1985), exceptions may be granted "when estimated payments on minerals production have already been made timely and otherwise in accordance with instructions provided by MMS to the operator/lessee." Cyprus has not submitted any evidence to show that it had made arrangements with MMS to make estimated payments.

Cyprus does not contend that it paid its royalties within the time required by the lease. Rather, it contends that MMS should be estopped from imposing late payment charges. This Board has well established rules governing our consideration of estoppel issues. We have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., *supra* at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See Ptarmigan Co., 91 IBLA 113, 117 (1986). Estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982). In addition, estoppel against the Government in matters concerning the public lands

^{1/} See also Amoco Production Co., 78 IBLA 93 (1983), a decision involving a lease issued pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1301-1343 (1982), in which the Board upheld the imposition of a late payment charge under a regulation similar to the one in issue.

must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); D. F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); and see Edward L. Ellis, 42 IBLA 66 (1979).

Under these standards, the doctrine of estoppel does not apply in the present case. First, MMS did not know the exact amount of royalties owed by Cyprus at the time of the December 20, 1984, meeting. In its letter to Colorado Yampa, dated September 11, 1984, BLM stated that "[u]pon receipt of your production tonnage and maps, the Craig District Office will notify Minerals Management Service of the delinquent production quantity. Minerals Management Service will then determine the delinquent amount and daily interest accrued on the delinquent amount and bill you accordingly." In its letter to Colorado Yampa of February 7, 1985, MMS states that it did not receive information from Cyprus concerning the delinquent payments until December 27, 1984. 2/

Second, Cyprus has not submitted any evidence to show that statements made by MMS at the December meeting would lead Cyprus to believe that no late charge would be assessed. Cyprus submits the affidavit of its attorney who attended the meeting to show that MMS represented that no late charges would be assessed. The affidavit reads in pertinent part:

During the course of our December 20, 1984 meeting with Mr. Richards and Mr. Spencer, Mr. Spaulding and I were advised that if Colorado Yampa paid all of the royalty amounts which the company was advised were due and owing as of that time, reserving the right to recover such royalties if its retroactive royalty reduction application was granted, then Federal Coal Lease C-22644 would be considered by the Department of the Interior to be current as to all outstanding royalty obligations, and processing of the second royalty reduction application would resume.

(Appellant's Exh. B at 2). We do not find that MMS has represented that no late payment charges would be collected.

2/ The Board, recognizing the realities of administering the collection of royalties, stated in Amoco Production Co., supra at 101:

"When the lessee's reports and payments are received, MMS cannot immediately know the correctness of such material. It must necessarily take time to assemble the necessary data and then interpret it. Delays are reasonable in view of the burden upon it to perform this audit function for the many leases it must manage. Postpayment audits are a common incident to mineral lease management. See e.g., Mobil Oil Corp., 65 IBLA 295 (1982). Contrary to Amoco's claim, the delay in its payment of the correct amount due is attributable to its own activities and not those of MMS."

Third, Cyprus could not have been ignorant of the true facts. The requirement to pay royalties by a certain date is specified in the lease as is the royalty rate. Authorization for late payment charges for failure to pay by that date is set forth in the Departmental regulations. Persons dealing with the Government are chargeable with knowledge of statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Fourth, Cyprus has not submitted any evidence to show that it acted or failed to act in reliance on any statement made by MMS. As noted by MMS, Cyprus' affidavit seems to indicate that its decision to pay the principal amount was motivated by its desire for BLM to proceed with its royalty reduction application.

Nor does there appear to have been any affirmative misrepresentation or concealment of facts by Departmental officials. No allegation has been made that appellant was ever told that a late payment charge would not be imposed. That such implicit representation might be ascribed to the Department based on the discussion at the December meeting does not constitute affirmative misconduct. See Enfield Resources, 101 IBLA 120, 125 (1988); Ptarmigan Co., *supra* at 117-18.

Cyprus does not refer to any written document stating that a late charge would not be imposed. Indeed, the Department's letters of September 11, 1984, February 7, and November 6, 1985, all specify that appropriate late charges would be computed.

In Steve E. Cate, 97 IBLA 27, 32 (1987), the Board discussed the difficulty inherent in finding a claim of estoppel based on alleged oral advice. The Board quoted the Supreme Court in Heckler v. Community Health Services, 467 U.S. 51, 65, 104 S. Ct. 2218, 2226-27 (1984), which reads in pertinent part:

The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subject that advice to the possibility of review, criticism and reexamination.

This Board has expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be, inter alia, "in the form of a crucial misstatement in an official decision." United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975), quoting from Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974). See also Enfield Resources, *supra* at 126. Since appellant can point to no such misstatement in an official decision, this is another ground for rejecting its claim of estoppel.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

John H. Kelly
Administrative Judge